UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

SERGE CHERY,	:	
Petitioner,	:	
	:	
-vs-	:	Civ. No. 3:01cv1883 (PCD)
	:	
JOHN ASHCROFT, Attorney General of	:	
the United States,	:	
Respondent.	:	

RULING ON GOVERNMENT'S MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, A STAY OF THIS COURT'S ORDER

Respondent moves for reconsideration of the ruling granting the petition for writ of habeas corpus pursuant to FED. R. CIV. P. 59 arguing that the ruling was predicated on a misunderstanding of the relevant facts and applicable law. In the alternative, respondent moves that the order that petitioner be released be stayed pending appeal of the ruling. For the reasons set forth herein, the motion for reconsideration is granted, the objection is overruled and the prior ruling is adhered to. The motion for stay pending appeal is denied.

Respondent initially argues that the analysis of whether the offense for which petitioner was convicted constitutes a crime of violence was improperly premised on characterization of the offense as second degree sexual assault, CONN. GEN. STAT. § 53a-71(a), rather than sexual intercourse with a minor between the ages of thirteen and sixteen, CONN. GEN. STAT. § 53a-71(a)(1). Respondent concedes that "the certified disposition does not include the precise paragraph under § 53a-71 for which petitioner was convicted" but argues that the specific offense is defined in "petitioner's

computerized criminal history," an "Application for Arrest Warrant"[1] and testimony during the removal proceedings.

Respondent does not dispute that neither the short form criminal information nor the judgment form describes the factual basis for the conviction or includes reference to § 53a-71(a)(1). The authority cited by respondent in support of its argument that reference may be had to other documents in determining the nature of the crime for which petitioner was convicted, *United States v. Palmer*, 68 F.3d 52, 56 (2d Cir. 1995), does not provide *carte blanche* authorization to review documents other than criminal complaints, judgment forms or jury instructions but rather sanctions the review of underlying facts when the statute at issue is severable into violent and non-violent offenses. This is precisely the reason that the offense was not characterized based on the proffered documents. *See Sutherland v. Reno*, 228 F.3d 171, 177 n.5 (2d Cir. 2000). As respondent did not argue that § 53a-71(a) was severable, there was no basis for review of the factual record.[2]

Respondent also argues, citing the 1971 Commission Comment to § 53a-71, that "the State Legislature has expressly declared that the statute 'deals with non-consensual sexual intercourse." No explanation is made as to how such a statement fits into the categorical analysis described in *Dalton v. Ashcroft*, 257 F.3d 200, 204 (2d Cir. 2001), nor does respondent contend that this Commission

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1 Under Connecticut law, a statement of facts may be appended to the short form information on request of the defendant or by the Court for good cause shown when the form includes only the statute alleged to have been violated as in the present case. *See* CT. R. SUPER. CT. CR. § 36-19. Respondent provides no evidence that the arrest warrant provided detailing the underlying facts of petitioner's offense was so incorporated into the criminal information and such incorporation will not be presumed by the mere submission of an arrest warrant.

2 Notwithstanding respondent's failure to raise expressly an argument that § 53a-71 was severable into crimes of violence and non-violence, respondent's argument was construed as implicating such an argument and thus § 53a-71(a)(1) was analyzed in ascertaining whether § 53a-71(a) was severable.

Comment in any way establishes consent or non-consent as an element of the offense. *See Sutherland*, 228 F.3d at 176. A plain reading of the statute, which requires neither a reference to case law nor to legislative statements to ascertain the requisite elements for a conviction of the offense, reveals that the consent or non-consent of the victim is patently irrelevant. The argument is therefore without merit.

Respondent also takes umbrage with a reference to state authority in determining whether a § 53a-71 violation is a crime of violence, specifically to CONN. GEN. STAT. § 54-252(a). In analyzing the nature of § 53a-71(a)(1), the observation was made that the sexual offender registration law of Connecticut specifically excluded the crime from its definition of sexually violent offense. Respondent cited to the law of other Circuits involving what may be loosely characterized as "crimes against children" in support of its argument that § 53a-71(a)(1) should be considered a crime of violence. The bare citation to this law, bereft of any showing that the analysis employed in those cases both involved similar offenses and employed the proper categorical analysis, was rejected to the extent that it proposed a broad, *per se* rule mandating that the present offense be considered a crime of violence. Section 54-252(a) was provided as illustrative of the proposition that were § 53a-71(a)(1) so readily classified as a crime of violence, it is indeed a peculiarity that Connecticut itself has, in one context, issued a legislative statement indicating otherwise. In any event, this reference was in no way dispositve of the federal question of whether a conviction for violation of § 53a-71(a) constitutes a crime of violence.

Respondent also rehashes its original argument that "the Courts of Appeals have consistently held that sexual intercourse with a minor constitutes a 'crime of violence' under 18 U.S.C. § 16(b)." Respondent does no more than in its original memorandum to explain how, under the appropriate

categorical analysis, the decisions of Courts of Appeals for other Circuits are valid in light of the specific offense cited and appears to invoke the same *per se* rule summarily rejected in the original ruling.[3] Further it is meritless to argue that constructions of statutes of other states by other Courts of Appeals can illuminate the proper understanding of a Connecticut statute.

The motion for reconsideration (Docs. 11&12) is **granted**. However, for the reasons discussed above, the objection is overruled and the prior ruling is adhered to. The motion to stay the order pending appeal is denied.

SO ORDERED.

Dated at New Haven, Connecticut, July ___, 2002.

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Peter C. Dorsey
United States District Judge

[3] Respondent also adds under the guise of "argument" that the "INS has the authority to institute a subsequent removal proceeding based upon the charges that were not included in the original charging document." The authority of the INS to remove those who have committed the offense of second degree sexual assault was not at issue in the ruling on the habeas petition. Rather, the issue before this Court was whether the INS could remove one for second degree sexual assault on the limited ground of its characterization as a crime of crime of violence. As was indicated in the original ruling, it may be appropriate to remove one such as petitioner on another ground. However, the ability to so remove petitioner is wholly irrelevant to the legal question at hand and does not justify forcing the proverbial square peg in the round hole to reach what respondent opines to be the same result had it pursued removal on a different ground.